

NO. 19020-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEE COOK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Terry D. Sebring, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ARGUMENT IN REPLY</u> | 1 |
| 1. THE STATE HAS IMPLICITLY CONCEDED THAT ANY TRIAL ERRORS WERE NOT HARMLESS. | 1 |
| 2. EVIDENCE OF LEE'S GANG AFFILIATION WAS IRRELEVANT AND WAS IMPROPERLY ADMITTED. | 1 |
| a. <u>Admission of gang evidence violated constitutional rights to freedom of association and due process of law.</u> | 3 |
| b. <u>The gang evidence was not properly admitted under the Rules of Evidence.</u> | 4 |
| 2. THE TRIAL COURT ERRED IN ADMITTING PRIOR FELONY CONVICTIONS FOR IMPEACHMENT PURPOSES WITHOUT CONSIDERING WHETHER THE NATURE OF THE PRIOR OFFENSES WAS PROBATIVE OF VERACITY. | 4 |
| 3. THE TRIAL COURT ERRED IN EXCLUDING LEE'S EXCITED UTTERANCES. | 6 |
| 4. EVIDENCE THAT LEE VOLUNTARILY TURNED HIMSELF IN TO THE POLICE WAS IMPROPERLY EXCLUDED. | 8 |
| 5. APPELLANT HAS NOT ABANDONED ASSIGNMENTS OF ERROR NUMBERS 5 AND 14. | 9 |
| 6. EVIDENCE OF JAMES' COCAINE USE WAS IMPROPERLY EXCLUDED AT TRIAL. | 10 |

TABLE OF CONTENTS (CONT'D)

| | Page |
|--|------|
| 7. EXPERT TESTIMONY NECESSARY TO ALLOW PRESENTATION OF A DEFENSE WAS IMPROPERLY EXCLUDED. | 12 |
| 8. EVIDENTIARY ERRORS DENIED APPELLANT THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE. | 14 |
| 9. THE TRIAL COURT IMPROPERLY DISMISSED JUROR TRESSNUS. | 15 |
| 10. THE TRIAL COURT ERRED IN REFUSING THE PROPOSED INSTRUCTION ON NO DUTY TO RETREAT. | 17 |
| 11. THE TRIAL COURT ERRED IN GIVING THE INSTRUCTION BASED UPON <u>STATE V.</u> <u>JANES</u> | 17 |
| 12. IN HIS SUPPLEMENTAL BRIEF, APPELLANT MADE A PRIMA FACIE SHOWING OF ERROR TO WHICH THE STATE HAS NOT RESPONDED. REVERSAL IS APPROPRIATE. . | 17 |
| B. <u>CONCLUSION</u> | 18 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--|------|
| <u>Adams v. Department of Labor and Industries,</u> 128 Wn.2d 224, 905 P.2d 1220 (1995) | 1, 9 |
| <u>Aquarian Foundation v. KTVW, Inc.,</u> 11 Wn. App. 476, 523 P.2d 969 (1974) | 18 |
| <u>Bolt v. Hurn,</u> 40 Wn. App. 54, 696 P.2d 1261 (1985) | 18 |
| <u>State v. Campbell,</u> 78 Wn. App. 813, 901 P.2d 1050, <u>rev. denied</u> , 128 Wn.2d 1004 (1995) | 3, 4 |
| <u>State v. Despenza,</u> 38 Wn. App. 645, 689 P.2d 86, <u>rev. denied</u> , 103 Wn.2d 1005 (1984) | 14 |
| <u>State v. Froehlich,</u> 96 Wn.2d 301, 635 P.2d 127 (1981) | 14 |
| <u>State v. Harris,</u> 34 Wn. App. 649, 663 P.2d 854, <u>affirmed</u> , 102 Wn.2d 148, 685 P.2d 584 (1983) | 8 |
| <u>State v. Hatley,</u> 41 Wn. App. 789, 706 P.2d 1083 (1985) | 16 |
| <u>State v. Hebert,</u> 33 Wn. App. 512, 656 P.2d 1106 (1982) | 8 |
| <u>State v. Janes,</u> 121 Wn.2d 220, 850 P.2d 495 (1993) | 17 |
| <u>State v. King,</u> 75 Wn. App. 899, 878 P.2d 466 (1994) | 5, 6 |

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

| | |
|---|----|
| <u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996) | 17 |
| <u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996) | 14 |
| <u>State v. Rupe</u> , 108 Wn.2d 734, 743 P.2d 210 (1987), <u>cert. denied</u> , 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988) | 16 |
| <u>State v. Wilburn</u> , 51 Wn. App. 827, 755 P.2d 842 (1988) | 18 |

RULES, STATUTES AND OTHERS

| | |
|----------------------------|------|
| Const. Art. 1, § 22 | 15 |
| ER 402 | 4 |
| ER 403 | 4 |
| RCW 5.60.050 | 13 |
| U.S. Const. amend. 1 | 3, 4 |
| U.S. Const. amend. 6 | 15 |

A. ARGUMENT IN REPLY

1. THE STATE HAS IMPLICITLY CONCEDED THAT ANY TRIAL ERRORS WERE NOT HARMLESS

The state did not argue at any point in its response brief that any trial court errors could have been harmless. While appellant is aware that the failure of the state to argue that any errors were harmless does not alter this Court's standard of review, see, e.g., Adams v. Department of Labor and Industries, 128 Wn.2d 224, 228-9, 905 P.2d 1220 (1995), the state does appear to have conceded that any error found by this court is prejudicial as set forth in Appellant's opening brief. For the reasons set forth in the Brief of Appellant, the errors in this case were not harmless. If this court finds any error below, the proper remedy will be to reverse the conviction and remand for further proceedings.

2. EVIDENCE OF LEE'S GANG AFFILIATION WAS IRRELEVANT AND WAS IMPROPERLY ADMITTED

The state has argued at pages 17-24 of its brief that gang evidence was properly admitted because it was relevant to prove the state's theory that Lee "murdered Robinson after Robinson, a Hilltop Crip, 'disrespected' defendant, a Blood." Brief of Respondent at 17. The theory that gang membership proved motive in this case is a fantasy unsupported by the record. The evidence was that this case involved a potential drug sale where Lee Cook became the victim of a robbery, and that nothing about the case was related to gang membership. Absent some evidence tying gang

evidence to motive, the evidence was irrelevant and should not have been admitted.

The state's own wording of this motive theory demonstrates the fatal flaw in it. The state does not argue that Lee killed Robinson because he was a Crip or because he disrespected Lee. Rather, it points out only that Robinson died after a showing of disrespect. There is no evidence to tie the disrespect to the killing. There is no evidence of Lee saying, "I killed him because he would not shake my hand." Williams, who spent several hours with Lee after Robinson died, does not testify at any point that Lee ever mentioned gang membership as a motive for the shooting. The state's own expert testified that neither Lee nor Robinson were wearing gang colors. The defense expert testified that nothing in the evidence showed that the shooting was related to gang membership. There is no evidence of Lee indicating in any way that he was affected by or even noticed the alleged disrespect. Rather Lee testified that the failure to shake hands was not disrespectful and that he was not humiliated by the fact that Robinson was a Crip. All the state had was the coincidence that

during a robbery, which did not appear to be gang related, the robbery victim shot the robber who happened to be a Crip. The state presented no evidence to show that the disrespect rather than the robbery provided a motive for murder. Thus, gang evidence was not relevant and was not properly admitted.

a. Admission of gang evidence violated constitutional rights to freedom of association and due process of law

The state attempts to rebut the contention that Lee's First Amendment and Due Process rights were violated by arguing that the gang evidence was relevant to prove motive and that therefore, under State v. Campbell, 78 Wn. App. 813, 822-23, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995), there was no First Amendment violation. Brief of Respondent at 17-18. While the state is correct that Campbell does allow admission of relevant gang evidence, Campbell does not allow admission of irrelevant gang evidence as presented in this case.

The state lacked any evidence to tie gang evidence to motive. Thus, admission of the evidence violated the First Amendment and now requires reversal of the conviction.

b. The gang evidence was not properly admitted under the Rules of Evidence

The state has argued that the gang evidence was properly admitted under the Rules of Evidence citing Campbell, supra. Brief of Respondent at 19-25. However, the state's argument is, like its First Amendment argument, premised on the erroneous assertion that evidence regarding gangs was

probative of motive. As set out above, the evidence regarding gangs was never tied to motive by any proof. Absent such proof, the evidence was irrelevant and inadmissible. ER 402, 403.

2. THE TRIAL COURT ERRED IN ADMITTING PRIOR FELONY CONVICTIONS FOR IMPEACHMENT PURPOSES WITHOUT CONSIDERING WHETHER THE NATURE OF THE PRIOR OFFENSES WAS PROBATIVE OF VERACITY

In deciding whether to admit Lee's prior drug convictions for impeachment purposes, the trial court did not consider the impeachment value of the prior offenses. 2RP 75-80. The state does not dispute this in its brief. Brief of Respondent at 25-28. This failure was an abuse of discretion which now requires reversal of the conviction. State v. King, 75 Wn. App. 899, 910, 878 P.2d 466 (1994) (trial court abused its discretion where it failed to consider impeachment value of prior conviction in determining its admissibility for impeachment purposes).

Not only does the state not dispute that the trial court failed to consider the impeachment value of Lee's prior convictions, the state does not attempt to rebut appellant's argument that the prior drug convictions had no impeachment value. Brief of Appellant at 39-41; Brief of Respondent at 25-28. The failure to rebut this argument can be interpreted as the state's concession that the prior convictions had no impeachment value.

Instead of contending that the prior convictions had some worth in helping the jury to assess Lee's credibility, the state merely argues that Lee's credibility was central to the case and therefore, the prior convictions should be admitted. This argument ignores the point that centrality of the credibility issue both favors and disfavors admission of prior offenses and that centrality of the credibility issue does not answer the question of whether the priors have any impeachment value in the first place. As set out in State v. King:

When . . . the defendant's testimony is

virtually the sole evidence in his defense, the trial court is faced with a difficult decision. Admitting the prior convictions is prejudicial in itself and may work additional prejudice if it deters the defendant from taking the stand. At the same time, if the defendant's testimony is critical to the outcome of the case, then it is unfair to deprive the jury of any properly probative information that may help it to evaluate the defendant's credibility. But the jury's need for information with which to evaluate the defendant's credibility does not resolve the original question as to whether the information about a prior conviction is properly probative -- that is, in some way other than through the assumption 'once a criminal, always a liar'. . . .

King, 75 Wn. App. at 907-08.

The prior drug convictions were not probative of veracity. They should not have been admitted for impeachment purposes. As a result of the error in admitting the priors, the conviction should be reversed.

3. THE TRIAL COURT ERRED IN EXCLUDING LEE'S EXCITED UTTERANCES.

The trial court erred in excluding statements made shortly after the shooting that Lee had acted in self-defense.

The state mistakenly suggests that appellant has argued that statements made within 50 minutes of a stressful event are automatically admissible

and that therefore Lee's statements were admissible. Brief of Respondent at 29. This, appellant did not assert. Rather appellant stated that "Prior appellate cases establish that such a period of delay does not preclude application of the excited utterance rule." Brief of Appellant at 45.

Both the state and appellant agree that the decisive factor in determining the admissibility of Lee's statements is whether Lee was still under the stress of excitement caused by the robbery and subsequent shooting. Brief of Appellant at 43-44; Brief of Respondent at 29.

There was ample evidence that Lee was still under the stress of excitement of the shooting when he spoke with Williams. The event had occurred less than an hour before the statements were made.

Williams stated that Lee was upset, running around and sweating just prior to making the statements. Lee appeared to Williams to be in shock.¹ This

¹ The state argues that Williams' testimony about Lee's excited state was "highly equivocal". Brief of Respondent at 30. However, the state does not cite any basis in the record for this conclusion, and the record does not support this conclusion.

evidence indicates that Lee's statements were excited utterances. As such, the statements should have been admitted at trial.

4. EVIDENCE THAT LEE VOLUNTARILY TURNED HIMSELF IN TO THE POLICE WAS IMPROPERLY EXCLUDED.

The state argues that the question of whether evidence that Lee voluntarily turned himself in to the police should not be considered because the argument was not supported by citation to authority. Brief of Respondent at 30. However, Appellant cites both State v. Harris, 34 Wn. App. 649, 663 P.2d 854, affirmed, 102 Wn.2d 148, 685 P.2d 584 (1983), and State v. Hebert, 33 Wn. App. 512, 656 P.2d 1106 (1982), in his brief. Brief of Appellant at 47. Thus, this Court should reject the state's argument that the issue should not be considered.

As for how this issue should be resolved, Appellant relies upon his Opening Brief at pages 46-47.

5. APPELLANT HAS NOT ABANDONED ASSIGNMENTS OF ERROR NUMBERS 5 AND 14

The state asserts that Assignments of Error numbers 5 and 14 have been abandoned as they are not supported by argument or citation to authority.

Brief of Respondent at 32-33. This assertion is incorrect.

Assignment of Error 5 is that "the trial court erred in denying the defense motion for a mistrial after the court made erroneous evidentiary rulings which made presentation of the defense case impossible." Brief of Appellant at 1. This

Assignment of Error is clearly addressed in footnote 8 of Appellant's Brief. Although this is not a long argument, it is an argument. Brevity was compelled by the large numbers of errors required to be addressed in this appeal and by this Court's denial of Appellant's original motion to file an over length brief. The assignment of error was not abandoned. See Adams v. Department of Labor and Industries, 128 Wn.2d at 228-29 (the quantity or quality of appellate briefing should not affect the standard of review the appellate court applies to a case).

Assignment of Error 14 read, "The trial court erred in denying the defense motion for a mistrial after improperly dismissing a juror during the course of trial." This assignment of error is addressed at pages 62-63 of the Brief of Appellant.

Again the state has confused brevity with abandonment.

6. EVIDENCE OF JAMES' COCAINE USE WAS
IMPROPERLY EXCLUDED AT TRIAL

Evidence of James' cocaine use and addiction in the years, days, and hours preceding the shooting was relevant and should have been admitted

because James' cocaine addiction and use affected his ability to perceive, recall and report events. The state argues that evidence of James' cocaine use just prior to and during the past several years was admitted at trial and so there was no error. The state's argument rests upon an erroneous reading of the record. Such evidence was excluded and the exclusion was error.

The trial court specifically disallowed evidence relating to cocaine addiction and use any time prior to 24 hours before the shooting. See 9RP 896, where the court responds to a state's objection to defense questioning which would have elicited testimony about James' cocaine use prior to the shooting:

Well, as long as the question is geared to the 24 hour period before the shooting, I will allow it, but you need to frame your question so that you are asking them as to -- I think the time frame is late evening of the 28th into the 29th. So it's worded in that fashion. I will allow the question.

The trial court was clear that evidence of cocaine use and addiction prior to the 24 hours preceding the shooting was not admissible. The state's argument that such evidence was allowed is incor-

rect.

Additionally, it should be noted that the state does not provide any authority to support its contention that evidence of cocaine use and addiction in the days and years preceding the shooting would not have been relevant in light of the anticipated expert testimony that those addicted to cocaine lose the ability to accurately perceive, recall and report events. Brief of Respondent at 34. Moreover, as set out in Brief of Appellant at pages 47-49, the evidence was relevant and should have been admitted.

7. EXPERT TESTIMONY NECESSARY TO ALLOW
PRESENTATION OF A DEFENSE WAS IMPROPERLY
EXCLUDED.

As set out in appellant's opening brief, the trial court erred in excluding expert testimony from Mike Beakley regarding whether the events preceding the shooting appeared to be a typical robbery set up; reaction times; and ballistics. Appellant relies upon his opening brief on these issues except upon one point. Brief of Appellant at 49-53.

The state asserts at pages 37-38 of its brief that ballistics evidence was properly excluded

because Mike Beakley was never qualified as an expert in that area. However, the record reveals that defense counsel offered twice to qualify Beakley as an expert, but the court refused that evidence because it had concluded that ballistics is not an area of expertise. 10RP 991-995.

The state next argues that the trial court did not err in excluding expert testimony about how long term cocaine addiction would have affected James' ability to perceive and recall events because a witness may not testify regarding the credibility of another witness. In so arguing, the state did not dispute that the trial court erred in refusing the expert testimony because the judge did not believe this was an area of expertise, did not believe the expert was qualified and did not believe the expert when he stated that cocaine dependent individuals are inaccurate in their recall and reporting of events, particularly emotionally laden events. Brief of Respondent at 38-39; Brief of Appellant at 54-56. Thus, the state seems to have implicitly conceded that the trial court was in error in drawing these conclusions.

The state's remaining assertion, that the expert testimony should have been excluded because it involved the credibility of another witness, misunderstands the nature of the proposed testimony. Dr. Moore's testimony that cocaine addicts cannot accurately recall and report went to the competency of the witness as opposed to whether he was telling the truth. Dr. Moore's testimony was not that James was lying because he was a cocaine addict. Rather, it was that James may have lacked the basic qualifications of a witness, that he could receive just impressions of the facts and relate them truly because he was a cocaine addict.

RCW 5.60.050. It has long been held that expert testimony is proper to establish whether a witness is capable of receiving just impressions and then relating them truthfully. State v. Froehlich, 96 Wn.2d 301, 305-8, 635 P.2d 127 (1981) (noting that in a proper case counsel may call an expert witness to testify as to the witness' mental infirmity); State v. Despenza, 38 Wn. App. 645, 648, 689 P.2d 86 (stating that where the mental disability of a witness is clearly apparent and his competency is a central issue in the case, appropriate expert

testimony is admissible to define the mental condition or its consequences), rev. denied, 103 Wn.2d 1005 (1984). The state's assertion that such expert testimony is not admissible is erroneous.

8. EVIDENTIARY ERRORS DENIED APPELLANT THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

As set out in the Brief of Appellant at 57-59, the trial court's rulings excluding relevant evidence denied Lee his constitutional right to present a defense. In addition to the cases cited in the opening brief, Lee relies upon a new case, State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996), finding that exclusion of testimony that a child victim was seen alive with another person the day after the defendant was alleged to have committed murder violated the defendant's constitutional right to compulsory process. U.S. Const. amend. 6 and Const. Art. 1, § 22. By excluding so much relevant evidence in this case, the trial court prevented Lee from presenting his case and denied him his constitutional rights to due process and compulsory process.

9. THE TRIAL COURT IMPROPERLY DISMISSED JUROR TRESSNUS

The state has argued that the trial court's decision to dismiss Juror Tressnus is subject to an abuse of discretion standard and that the court did not abuse its discretion in dismissing her. Brief of Respondent at 43-44. In so arguing the state has confused cases regarding the decision of whether to allow someone to sit on the jury in the first place with cases involving the situation

here, where the decision is whether to allow someone already on the jury to remain following a premature expression of opinion as to the proper outcome of the case. When this confusion is removed, it is clear that the issue is to be reviewed as a question of law and that the decision to dismiss Tressnus was reversible error.

The state relies upon State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987), cert. denied, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988), for the proposition that the abuse of discretion standard applies to this case. However, in Rupe, the supreme court was reviewing a judge's decision to excuse three jurors that the defense challenged for cause. In that review, the supreme court stated: "Granting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion."

Id., at 748. Rupe does not say anything about the proper standard for review of the decision to remove a juror from a case after evidence has already been presented. That standard is dictated by State v. Hatley, 41 Wn. App. 789, 795-96 n.3, 706 P.2d 1083 (1985), which specifically rejects

the argument that the decision to remove a juror after a case has begun is to be reviewed as a question of fact. Hatley states: "Whether a juror who has prematurely formed an opinion based only upon the evidence presented at trial is impartial is a question of law." Id.

Appellant relies on his opening brief at pages 59-63 to demonstrate that the trial court erred in dismissing Tressnus.

10. THE TRIAL COURT ERRED IN REFUSING THE PROPOSED INSTRUCTION ON NO DUTY TO RETREAT.

Appellant relies upon his Opening Brief at pages 63-66 to establish that the trial court erred in refusing to give a no duty to retreat instruction.

11. THE TRIAL COURT ERRED IN GIVING THE INSTRUCTION BASED UPON STATE V. JANES.

Appellant relies upon his Opening Brief at pages 67-69 to establish that the trial court erred in giving the instruction based upon State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993).

12. IN HIS SUPPLEMENTAL BRIEF, APPELLANT MADE A PRIMA FACIE SHOWING OF ERROR TO WHICH THE STATE HAS NOT RESPONDED. REVERSAL IS APPROPRIATE

Appellant respectfully reminds the Court of the arguments raised in his supplemental brief. There he argued that the jury instructions on self-defense were prejudicially erroneous under State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996). To date the state has not filed a response to those

arguments, so appellant likely will be filing a supplemental reply brief should the state file a response. Should the state decline to file a response, appellant has made a prima facie showing of error, which requires reversal. State v. Wilburn, 51 Wn. App. 827, 828-29, 755 P.2d 842 (1988); Bolt v. Hurn, 40 Wn. App. 54, 696 P.2d 1261 (1985); Aquarian Foundation v. KTVW, Inc., 11 Wn. App. 476, 523 P.2d 969 (1974).

B. CONCLUSION

Lee Cook did not get a fair trial as guaranteed by the state and federal constitutions, the Washington statutes and the Washington court rules. For the reasons set forth above and in his opening brief, Lee now asks this court to reverse his conviction.

DATED this _____ day of June, 2003.
Respectfully submitted,

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